THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION NO. 12562 of 2007

DATE: 04-07-2007

Between :

M/s. United Telecoms Limited, a company
Incorporated under the Companies Act, 1956
Having its registered office at 18A/19,
Doddanekundi Industrial Area, Manhadevapura Post,
Whitefield, Bangalore-560 048, Karnataka State,
Rep. By its Manager (Finance & Accounts) … Petitioner

And

1. The Chief General Manager, Bharat Sanchar Nigam Limited, AP Telecom Circle, Door Sanchar Bhavan, Abids, Hyderabad-1., and 2 others. … Respondents

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ORDER:

In response to the tenders invited by the first respondent for supply of Hand Held Terminals, the petitioner had participated and was declared as the successful bidder. Pursuant thereto, Purchase Order dated 02-09-2003 was issued in favour of the petitioner which constituted the award of contract as provided under Clause 28 of the Notice Inviting Tender.

As per clause 9 of the purchase order, the delivery schedule of the ordered terminals shall be six months from the placement of the Purchase Order. It is not in dispute that as per clause 8 of the purchase order, the petitioner had furnished performance bank guarantee for a sum of Rs.96.72 lakhs, dated 06-05-2003, issued by the UTI Bank, Banglore and supplied the WLL CD Mobile Terminals of the quantity as per the supply order.

It is relevant to note that as required under clause 20 of the Purchase Order, the petitioner had also undertaken the Annual Maintenance Contract of the WLL Terminals for three years which shall be signed at the end of the warranty period as per the charges specified thereunder. Accordingly, Annual Maintenance Contract (for short, 'AMC') was entered into between the parties on 29-10-2005.

As per clause 12 of AMC, the contractor-petitioner has to submit the performance bank guarantee for an amount equal to three years AMC charges which shall remain valid for six months after the date of completion of the three years AMC period. Accordingly, the petitioner submitted a bank guarantee dated 31-03-2005 issued by the State

Bank of Mysore valid up to 30-09-2008 for a sum of Rs.31,77,000/-.

The petitioner claims that as per the terms of the Comprehensive AMC, the petitioner-company had repaired and updated 4,460 Mobile Terminals. However, the payments required to be made to the petitioner company in terms of clause 8.4 of the AMC agreement dated 29-10-2005 have not been paid thereby compelling the petitioner to file O.S.No.543 of 2007 in the Court of the First Senior Civil Judge, City Civil Court, Hyderabad seeking a decree for recovery of Rs.69656/-.

The petitioner alleges that after receiving the summons in the said suit, the respondents 1 and 2 started harassing the petitioner and to see that the petitioner is handicapped from executing the contract, the respondents 1 and 2 sought to invoke the performance bank guarantee, dated 31-03-2005. Accordingly a letter dated 12-06-2007 was addressed to the State Bank of Mysore, Banglore branch requesting to invoke the bank guarantee and submit a draft for Rs.31,77,000/- drawn in favour of the respondents 1 and 2 immediately. Aggrieved by the said action of the respondents 1 and 2 this writ petition is filed contending *inter alia* that the action of the respondents for invocation of the bank guarantee while the AMC of the petitioner with respondents 1 and 2 is still in force is arbitrary and illegal. It is also contended that the impugned action is nothing but fraudulent exercise of the power since the only reason for invocation of the bank guarantee is that the petitioner had filed a civil suit for recovery of the amounts due.

A counter affidavit has been filed on behalf of the respondents 1 and 2 stating that the petitioner has committed serious default in complying with the terms of the contract and consequently, as per clause 15.2 of the General Commercial Conditions of the Contract, the petitioner is liable for any or all of the following sanctions.

1) *Imposition of liquidating damages*
2) *Short closing/termination of the contract for default*
3) *Forfeiture of performance security.*

It is contended that in view of the default committed by the petitioner, liquidated damages were already imposed by way of penalties and thereafter, the second respondent issued a notice dated 10/17-04-2006 informing the petitioner that the contract would be terminated and the bank guarantee would be invoked for the default committed by the petitioner. Again another letter dated 08-05-2006 was sent to the petitioner as a final notice. However, since the petitioner did not rectify the defects and committed default and breach of contract, the bank guarantee was invoked vide letter dated 12-06-2007. It is contended that the invocation of bank guarantee has nothing to do with the termination of contract as contended by the petitioner. The other allegations made by the petitioner that the impugned action was fraudulent and mala fide exercise of power have been categorically denied.

I have heard the learned counsel for both the parties.

The learned counsel for the respondents at the outset raised an objection as to the maintainability of the writ petition contending that since the dispute arose under a non-statutory contract, the petitioner cannot be permitted to invoke the
extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

In support of his contention, the learned counsel for the petitioner placed reliance upon the decisions of the Supreme Court in ***National Highway Authority of India v. M/s. Ganga Enterprises***[1] and the decision of this Court in W.P.No.19474 of 2005 dated 27-09-2005 which was affirmed on appeal by the Division Bench in W.A.No.1912 of 2005.

It is true that the contract in question is a non-statutory contract. However, the law is fairly well settled that even with regard to the disputes arising out of a non-statutory contract, there is no absolute bar to grant relief in exercise of the

extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

As held by the Supreme Court, in ***Shrilekha Vidyarthi (Kumari) v. State of U.P.,***[2] when an instrumentality of the case acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligation, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution of India and in such circumstances, there should not be any inhibition to grant the decided cases on the said issue. The Supreme Court in ***ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd***[3] held that there is no absolute bar with regard to disputes relating to contracts in case it does not involve serious disputed questions of fact, which require consideration of evidence and where the issue merely relates to interpretation/meaning of the documents involved.

From the principles laid down by the Apex Court, it is clear that each case requires to be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy and in case, the Court comes to a conclusion that the action of the State or its Instrumentality is vitiated on account of arbitrariness or violative of fair procedure envisaged under Articles 14 and 21 of the Constitution of India, this Court can interfere even in the matters arising out a non-statutory contracts.

Hence, the preliminary objection raised by the learned counsel for the respondents cannot be accepted and in my considered opinion, the fact that the contract in question is non-statutory by itself is not a bar to maintain this writ petition.

However, the learned Counsel for the respondents raised yet another objection as to the maintainability of the writ petition contending that the respondents cannot be restrained from the realisation of the amounts covered by the Bank Guarantee. The

learned Counsel contended that the 3rd respondent Bank who is the guarantor is liable to pay the guaranteed amount to the 1st respondent on demand, notwithstanding any dispute raised by the petitioner company with regard to its liability. In support of his contentions, the learned Counsel relied upon the decision of the Supreme Court in ***M/s. Ganga Enterprises*** case (1 supra).

The law relating to invocation of Bank Guarantees is no longer *res integra*. Where an unconditional Bank Guarantee is given or accepted, it is true that the Bank is liable to pay the guaranteed amount without any demur whatsoever and the Bank is bound to honour the guarantee irrespective of any dispute raised by its customer. However, the realisation of a Bank Guarantee shall always be as per the terms of the Contract of Guarantee.

The Apex Court as well as this Court in a catena of decisions held that the interference of the Court is permissible, if the invocation of the Bank Guarantee is against the terms of the guarantee or if there is any fraud. It was also held by the Courts that the realisation of the Bank Guarantee can be restrained by the Courts by granting an injunction where allowing the encashment of an Unconditional Bank Guarantee would result in irretrievable harm or injustice to one of the parties concerned. It was explained by the Courts that the harm or injustice contemplated under the said head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country {vide U.P. CO-OPERATIVE FEDERATION LTD. v. SINGH CONSULTANTS AND ENGINEERS (P) LTD. [(1988) 1 SCC 174]; SVENSKA HANDELSBANKEN v. M/s. INDIAN CHARGE CHROME [(1994) 1 SCC 502]; and U.P. STATE SUGAR CORPN. v. M/s. SUMAC INTERNATIONAL LTD. [(AIR 1997 SC 1644)] }.

As noticed above the contention of the petitioner in the instant case is that the impugned action of the respondents 1 and 2 in

seeking to encash the Bank Guarantee dated 31-03-2005 is against the terms of AMC as well as the Bank Guarantee and therefore impermissible. The learned Counsel while relying upon Clause-10.1 of the AMC dated 29-10-2005 contended that the performance guarantee furnished under the said agreement is liable to be encashed only in the event of termination of the contract and since the AMC in favour of the petitioner dated 29-10-2005 is still subsisting, the respondents are not entitled to encash the Bank Guarantee on any ground whatsoever.

On the other hand, the learned Counsel for the respondents contended that the AMC dated 29-10-2005 forms part of the original contract vide Purchase Order dated 2-9-2003 and therefore the respondents are entitled to invoke Clause-15.2 of the General (Commercial) Conditions of the Contract which entitles the respondents 1 & 2 either to forfeit the performance security or to terminate the contract or impose liquidated damages where the contractor commits default in complying with the contractual terms.

On a careful consideration of the material on record, it is clear that Clause-20 of the Purchase Order dated 2-9-2003 itself mandated signing of AMC for three years along with a performance guarantee for the total amount of AMC charges for three years. It is also relevant to note that the terms and conditions of Annual Maintenance Contract (AMC) were enclosed to the Purchase Order as Annex-E. Hence, undoubtedly the AMC forms part and parcel of the main contract for supply of the Hand Held Terminals awarded to the petitioner and therefore, the contention of the petitioner that AMC is an independent contract and that the same is unconnected with main contract cannot be accepted.

However, I do not find any substance in the contention of the respondents that they can rely upon Clause-15.2 of the General Conditions of Contract for invocation of Bank Guarantee dated 31-3-2005. Clause 15.2 on a plain reading refers to the delay on the part

of the supplier in the performance of its ***delivery obligations.*** Admittedly, that part of the contract was already completed and the Annual Maintenance Contract (AMC) was executed at the end of the warranty period.

The Bank Guarantee in question dated 31-3-2005 was furnished in terms of Condition No.12 of AMC for an amount equal to 3 years AMC charges undertaking that it shall remain valid for six months after the date of completion of 3 years AMC period. Condition 12.3 also made it clear that the Bank Guarantee shall be released after successful completion of the AMC contract.

It is also relevant to note that the Bank Guarantee dated 31-3-2005 specifically refers to AMC contract and the 3rd respondent Bank undertook to pay to the respondents 1 and 2 against any loss or damage caused to or suffered by reason of any breach by the contractor of any of the terms and contained in the said Agreement. Hence, there is absolutely no reason to assume that the said Bank Guarantee was for assuring satisfactory performance of ***delivery obligations*** to the petitioner.

In the circumstances, I am of the view that except for the purpose of compliance with the obligations under AMC, the respondents 1 and 2 cannot encash the Bank Guarantee on any other ground. Consequently, the respondents 1 and 2 cannot rely upon Clause-15.2 of the General Terms of Contract which provides consequences of non-performance of obligations under the main contract for delivery of Hand Held Terminals as per the supply order.

Clause-10 of AMC which provides for termination of AMC may be extracted hereunder :

> *"**10. Termination Clause :***
> ***10.1*** *In case the performance of the CONTRACTOR during AMC is not satisfactory, BSNL will have right to terminate the AMC during its currency, after giving the three months notice to the CONTRACTOR. The performance bank guarantee shall be en-cashed. In such an eventuality, the CONTRACTOR shall be bound to provide spares for the Terminals and other accessories at the price of original P.O.*

or a lower negotiated price."

As could be seen, Clause-10.1 of AMC provides for encashment of performance guarantee only in the eventuality of the termination of the contract in case the performance of the contractor during AMC is not satisfactory. Even assuming that the petitioner's performance is not satisfactory, since admittedly the AMC dated 29-10-2005 is still subsisting, the encashment of performance Bank Guarantee is impermissible being contrary to the very terms and conditions of the Bank Guarantee.

Accordingly, the Writ Petition is allowed declaring that the action of the respondents 1 and 2 in seeking to encash the Bank Guarantee dated 31-3-2005 is arbitrary, illegal and contrary to the terms of the Bank Guarantee dated 31-3-2005.

However, it is made clear that this shall not preclude the respondents 1 and 2 to encash the Bank Guarantee in question in terms of the AMC dated 29-10-2005 in case necessity thereof arises. No costs.

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G. ROHINI, J

Date: 04-07-2007
KLP
Note:- CC in 3days.

[1] AIR 2003 SC 3823

[2] 1991(1) SCC 212

[3] 2004(3) SCC 553